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No. 87-900

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

GERARD A. CASSINO and SALLY CASSINO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. Material Facts	1
B. Trial Court Rulings	2
C. Court of Appeals Decision	2
THIS WRIT SHOULD BE DENIED	2
I. Evidence of the termination under the unique facts presented here was appropriate and will have no impact on future implementation of the ADEA	2
A. Admissibility of the termination Agreement here is consistent with the ADEA, EEOC regulations, and all circuit courts	2
B. Admitting Evidence of a Proper Termination Agreement is Not Inconsistent with Federal Rules of Evidence 403 and 408, but Is Consistent with Rules 401 and 402	4
II. Front Pay is Appropriate when there is Hostility and No Position Open for Respondent .	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	Page
Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1346-47 (9th Cir. 1987)	5
Lancaster v. Buerkle Buick-Honda Co., 809 F.2d 539 (8th Cir.) cert. denied 107 S.Ct. 3212 (1987)	2,3
Moore v. McGraw Edison Co., 804 F.2d 1026, 1033 (8th Cir. 1986)	3
Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 n. 10 (6th Cir. 1986) (en banc) cert. denied 107 S.Ct. 178 (1987)	3

Statutes and Regulations

29 U.S.C. Sec. 621	1
29 C.F.R. Sec. 1627.16	1

Federal Rules of Evidence

FRE 401, 402, 403, 408	4,5,7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

GERARD A. CASSINO and SALLY CASSINO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents agree with Petitioner's recitation of OPINIONS BELOW, JURISDICTION OF THIS COURT, FEDERAL JURISDICTION, and that the Age Discrimination and Employment Act, 29 USC Sec. 621 et. seq. is the relevant statute. Respondents disagree that 29 CFR Sec. 1627.16[1] is pertinent because its effective date was September 28, 1987[2], nearly four and one-half years after Cassino was terminated, and more than two years after his trial.

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[1] See Petitioner's Appendix F

[2] Id., at 62(a).

STATEMENT OF THE CASE

A. Material Facts

Respondent Gerard Cassino ("Cassino"), was one of sixteen Reichhold employees laid off at the Tacoma, Washington plant during company reorganization on June 23, 1983. None of the people who were terminated had advance notice that they were going to be terminated. All of the terminated employees, including Cassino, were proffered settlement agreements and general releases.[3] The unique, particular language of that document is critical to this Petition. In it, Petitioner sought waiver of all "... rights under federal, state, or local laws prohibiting age or other forms of discrimination..."[4] Cassino refused this termination agreement, exhausted his administrative remedies, and sued Petitioner under, inter alia, the ADEA.

B. Trial Court Rulings

Respondents substantially agree with Petitioner's statement of Trial Court Rulings, except with regard to the argumentative statements about hostility and front pay.

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[3] See Petitioner's Appendix G.

[4] Id. at 1296(a).

C. Court of Appeals Decision

Respondent agrees with Petitioner's statement of the Court of Appeals decision.

THIS WRIT SHOULD BE DENIED

This Court should deny the Writ of Certiorari because the decision below is sound and does not conflict with existing statutory, regulatory or case law precedent.

I. Evidence of the termination under the unique facts presented here was appropriate and will have no impact on future implementation of the ADEA.

A. Admissibility of the Termination Agreement here is consistent with the ADEA, EEOC regulations, and all circuit courts.

Petitioner seeks protection afforded by case law interpreting settlement agreements which have been "knowingly and voluntarily entered into". Such an attempt by Petitioner is misguided and inappropriate. Here, there was a knowing and voluntary immediate rejection of a proper termination agreement. If Cassino had signed that document, Petitioner would have prevailed on Summary Judgment prior to trial. See, e.g., Lancaster v. Buerkle Buick-Honda Co., 809 F.2d 539 (8th Cir.) cert. denied, 107 S.Ct. 3212 (1987).

Petitioner, and any future employer who finds itself in the same situation which Reichhold did, can easily avoid the problem presented here. The way to avoid the problem is to denominate that the employee is releasing all claims not only with regard to age discrimination, but with regard to sex, race, national origin, religion, handicap, etc. If that language had been in the release proffered to Cassino, the smoking gun component of that termination agreement would not have been present and this Petition for Certiorari would not be sought on this issue. Petitioner had a sloppy settlement agreement and general release on this one issue, and has been made to pay for it. In Lancaster, supra, at 540, the 8th Circuit recited how Plaintiff had sought to show that a settlement agreement was not clear enough because it did not "... mention expressly any release of claims under the ADEA. Moore v. McGraw Edison Co., 804 F.2d 1026, 1033 (8th Cir. 1986) does not require the termination agreement specifically to mention the ADEA. See also Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 n. 10 (6th Cir. 1986) (en banc), cert. denied, 107 S.Ct. 178 (1987)". In the cited language from Runyan, supra, at 1044 n. 10, the 6th Circuit stated:

We reject Plaintiff's argument that the waiver does not apply to ADEA claims because it did not specifically refer to the ADEA.

Petitioner's attempt to manufacture a "conflict" on this point should not be well received by this Court.

Petitioner next cites a "conflict" with EEOC regulations. The regulation they refer to is 29 CFR Sec. 1627.16. As mentioned above, that has an effective date of September 28, 1987. That is more than four years after termination, more than two years after trial, and after the 9th Circuit issued its decision and denied a Petition for Rehearing en banc. Petitioner uses this new regulation for authority that age must be specifically mentioned in a release in order to give the release the full force and effect of law. This regulation changes that which has been held in case law as mentioned above. The regulation is not profound. Any time there is an actual dispute, controversy, administrative charge, or lawsuit, with regard to a claim of age discrimination, it would only make sense for the releasing party to mention that it was settling an age discrimination claim. Nothing profound there. Furthermore, administrative regulations do not have retroactive effect by force of law. Nor does the express wording

of the regulation in question provide for its retroactive application.

Denial of the Writ of Certiorari will strengthen the policies behind the ADEA, not undermine them. Where Petitioner reflects age consciousness, Respondents should be afforded wide latitude to establish discrimination since it is never admitted, and must be inferred from the deeds, words and actions of employers.

B. Admitting Evidence of a Proper Termination Agreement is Not Inconsistent with Federal Rules of Evidence 403 and 408, but Is Consistent with Rules 401 and 402.

The key rule here is FRE 408. That rule provides in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to their validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. (Emphasis added).

Petitioner misleads the Court in suggesting that there was a dispute at the time the termination agreement was proffered so that it should be precluded under Rule 408. Unlike the analogies Petitioner suggests, the situation here is more like one person

hitting another person with a club which has a release attached to the club. Clearly, that situation, and the situation at hand, are not contemplated as claims which are "...disputed as to their validity or amount..." Here, the parties talked settlement after charges and the suit were filed, Cassino did not offer such evidence because it was clearly inadmissible under 408 because there was a dispute existing.

This was a termination agreement, not a settlement agreement because there was no dispute, despite its title as a "settlement agreement and general release." The document was proffered to Cassino only to avoid a controversy if Petitioner felt it was discriminating on the basis of age. The document speaks for itself with the trier of fact able to read its clear and unambiguous language and to draw whatever inferences it wants from the written word.

Petitioner seeks alternative preclusion of the termination agreement under FRE 403. That rule provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time,

or needless presentation of cumulative evidence." There clearly was prejudice to Respondent by admitting the termination agreement. It was the same sort of prejudice a criminal defendant receives when an eyewitness testifies against him. The prejudice here was not the type sought to be precluded by FRE 403, because considerations under FRE 401 and 402 made this relevant evidence admissible as "... having any tendency to make the existence of any fact that is of consequence to the termination of the action more probable or less probable than it would be without the evidence." This evidence was helpful in establishing the age consciousness and mentality of Respondent, and was properly admitted.

II. Front Pay is Appropriate when there is Hostility and No Position Open for Respondent

Petitioner cites hostility created during litigation as an inadequate basis for award of front pay. That is a misinterpretation of the 9th Circuit opinion, and misleading to this Court. The precise language from the 9th Circuit opinion in Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1346-47 (9th Cir. 1987), is as follows:

The ADEA provides that '[i]n any

> jurisdiction to grant such legal or equitable relief as may be appropriate ... including without limitation judgments compelling employment, reinstatement or promotion ...' 29 U.S.C. Sec. 626(b). In discriminatory discharge cases, the decision whether to order reinstatement is within the discretion of the trial court. Cancellier, 672 F.2d at 1319. Although reinstatement is the preferred remedy in these cases, it may not be feasible where the relationship is hostile or no position is available due to a reduction in force. Thorne, 802 F.2d at 1137; Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984); Cancellier, 672 F.2d at 1319. Under such circumstances, an award of future damages or 'front pay' in lieu of reinstatement furthers the re,medial goals of the ADEA by returning the aggrieved party to the economic situation he would have enjoyed but for the defendant's illegal conduct. See Prudential Federal, 763 F.2d at 1173; Cancellier, 672 F.2d at 1319. Thus, front pay is an award of future lost earnings to make a victim of discrimination whole. Maxfield v. Sinclair Int'l, 766 F.2d 788, 795-96 (3d Cir. 1985), cert. denied, __U.S.__ 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-28 (2d Cir. 1984).

The defense at trial was that, due to a reduction in force and reorganization, there were no positions for Cassino with Petitioner. The Court in allowing the jury to consider front pay, and the jury in awarding front pay, rejected attempts by Petitioner to both have its cake and eat it too.

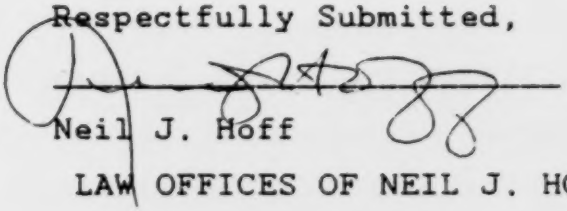
Hostility is not the only basis for the award of front pay. The Court was cognizant of the reduction in force which Petitioner presented evidence about. Front pay was properly introduced to make Cassino whole, and to deter Petitioner.

CONCLUSION

The 9th Circuit opinion will have minimum precedential value with regard to the termination agreement which was admitted into evidence. Since there was no dispute at the time, that document was not precluded by federal statutory, regulatory, or case law, including FRE 401, 402, 403 and 408. Front pay was properly awarded in this case to make Cassino whole.

The Petition for Writ of Certiorari in this case should be denied.

Respectfully Submitted,



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